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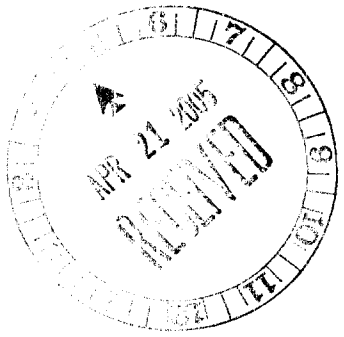

EX PARTE NO. 656

MOTOR CARRIER BUREAUS – PERIODIC REVIEW PROCEEDING

REBUTTAL COMMENTS OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., AND NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Small Shipments Traffic Conference, Inc. ("NASSTRAC") and the National Industrial Transportation League ("NITL") (collectively, the "Shipper Associations"), hereby file their rebuttal comments in this proceeding.

I. INTRODUCTION

Every five years, the Board is required by law to consider whether continued antitrust immunity for the NCC and rate bureaus is still in the public interest, and, if not, whether to terminate or further condition that immunity. The issues presented in this proceeding cannot be considered in isolation. There have been several highly relevant developments since the Board concluded its last antitrust immunity proceeding, which was commenced in 1997.

First, SMC is seeking not just five more years of antitrust immunity, but approval of its application to operate nationwide.

Second, several rate bureaus have folded or appear to be in poor financial condition, and there may be fewer operating rate bureaus even if nationwide authority for SMC is denied.

Third, if nationwide authority for SMC is granted, the ability of other rate bureaus to survive would be even more doubtful. It is possible that SMC, its CzarLite class rate base and its ancillary software and services would come to dominate motor carrier ratemaking. Reduced competition among rate bureaus would increase the need for further reforms.

Fourth, trucking industry capacity has decreased relative to demand. As a result, more carriers are negotiating higher rates and charges without regard to rate bureau general rate increases. And carriers such as FedEx and UPS have demonstrated the ability to operate in a highly profitable way without using collective ratemaking at all.

Fifth, increasing freight volumes reflect a growing economy in which more and more shippers, unfamiliar with the details of carrier pricing. Such shippers may be fully aware that their rates are subject to overt increases resulting from arms-length negotiations following a carrier rate increase request. However, many such shippers are unaware that their rates are also subject to covert rate increases resulting from NCC increases in the class ratings of their commodities, or rate bureau increases in the baseline bureau class rates to which their discount percentages are applied, or both.

Sixth, pressure on carriers for rate increases is high and rising, due to increased costs for fuel, insurance, additional drivers and driver pay increases, security screening, cleaner diesel and cleaner truck engines, etc. Rate increases resulting from collective car-

rier action could provide a non-market based means by which carriers could seek to recover such costs.

This Periodic Review Proceeding offers an opportunity to consider whether conditions imposed in the last such proceedings still provide adequate protection against anticompetitive carrier conduct in light of changed and changing conditions. However, in their comments to date, the NCC and rate bureaus have simply ignored the foregoing considerations.

Instead, they argue that they have not violated their agreements, that they perform various useful functions, and that any additional conditions would destroy the current system of collective carrier ratemaking. These arguments would not justify five more years of the status quo even if they were correct.

II. CONGRESS HAS NOT MANDATED CONTINUED ANTITRUST IMMUNITY

The NCC goes so far as to suggest that this proceeding can have only one outcome, contending that "[t]he public interest value of the motor carrier freight classification cannot be disputed." Reply Argument at 6. NCC relies on the fact that Congress has not yet eliminated NCC and rate bureau antitrust immunity by statute.

This argument is specious. Congress has also preserved the power of the STB to terminate (or condition) antitrust immunity administratively. The Shipper Conferences also note that, in its reply comments in this proceeding, the Department of Transportation expressed its support for termination of antitrust immunity for motor carrier collective ratemaking. We agree with DOT.

The principal result of NCC and rate bureau activity is price fixing, which would be a per se violation of the antitrust laws but for the antitrust immunity at issue in this

proceeding. The right of individual carriers to offer discounts based on competitive forces does not change this fundamental fact, particularly where the baseline rates are not competitively set, and where the carriers refuse to forego the right to charge full undiscounted rates.

Indeed, continued antitrust immunity would be difficult to justify under more lenient rule of reason standards. Under those standards, the issue is not whether there is some pro-competitive effect from collective action by competitors. It is rather whether there are such extensive pro-competitive effects as to outweigh any anticompetitive effects. See National Society of Professional Engineers v. United States, 435 U.S. 679, 688-89 (1975).

In those few instances in which antitrust immunity has been allowed, it has been disfavored and narrowly construed, based on sound legal and policy considerations. See, e.g., Silver v. New York Stock Exchange, 373 U.S. 341 (1963); American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) ("a standard setting organization ... can be rife with opportunities for anticompetitive activity"); and Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 943-44 (2d Cir. 1987), aff'd. 486 U.S. 492 (1988).

Under the circumstances, then, the fundamental issue in this proceeding is whether the status quo represents the way of pricing truck transportation services that best comports with the public interest. The issue can be addressed in two parts. First, assuming there are public benefits to have a national motor freight classification and having one or more baseline class rate tariffs, can those benefits be maintained without antitrust immunity for collective carrier action? Second, if antitrust immunity is not termi-

nated, can the risks of anticompetitive conduct by carriers be further reduced without losing benefits offered by a classification and base rates? The answer to each of these questions is yes.

III. ELIMINATION OF ANTITRUST IMMUNITY IS IN THE PUBLIC INTEREST

To the extent that it addresses the issue of termination of its antitrust immunity, the NCC bases its arguments on the alleged efficiency of motor carrier ratemaking based on a limited number of freight class ratings, and bureau tariffs containing corresponding baseline class rates. However, these arguments assume that these benefits would be lost if the NCC were to lose its antitrust immunity. This assumption is erroneous.

If the NCC were to lose its antirust immunity, the National Motor Freight Classification, with its class ratings of thousands of commodities and commodity groups, would not vanish. Carriers could still quote rates based on the NMFC, just as they do today, and shippers could accept, reject, or negotiate modifications in Classification based rates, just as they do today. The Board recognized this point years ago in its decision served December 18, 1998 in Section 5a Application No. 118 (Sub-No. 1), EC-MAC Motor Carriers Service Association, Inc., Et. Al:

> Indeed, if all that carriers needed were a baseline to which they can refer when making individual pricing decisions, they already have it: the class rate on any given commodity as of the date of this decision (or one week or one month or one year before this decision).

Slip opinion at 6. In a footnote to the quoted passage, omitted here, the Board also disposed of the argument that antitrust immunity is needed for interline rate setting.

It is true that if, in the future, changes in one or more commodity class ratings were thought necessary, there would be no NCC, acting with antitrust immunity, to make

those changes. But this would not make changes impossible. If a carrier wanted to change a current class rating, it would need to do so openly, by negotiating the change it sought with shippers, who could agree, disagree or negotiate a compromise.

This process routinely occurs in negotiations between shippers and carriers of other modes and between buyers and sellers of goods and services across America every day. There is nothing extraordinary about it. What is extraordinary is the motor carrier freight classification process, which is a complex, expensive anachronism that is unintelligible to most shippers. Railroads, air carriers, couriers and water carriers, not to mention millions of other enterprises populating the marketplace, obviously manage well with no collective ratemaking. The trucking industry can also do without it.

The rate bureaus make the same mistake. For example, the reply comments of Rocky Mountain Tariff Bureau state (at 4): "Further, the Shipper Associations pay no serious attention to the fact that elimination of antitrust immunity, or severe limitations on it, would heighten the transportation costs of their shipper members, and of the carriers with which they do business."

Just as the NCC contends that the end of its antitrust immunity would mean the end of the NMFC or of freight classification generally, the rate bureaus contend that the end of their antitrust immunity would mean the end of bureau class rates or of baseline rates generally. Neither contention is true.

Many discounts today are based on individual motor carriers' nationwide tariffs, or on shipper produced rate compilations, or on bureau class rate tariffs or products such as SMC's CzarLite. However, as with the NMFC, shippers and carriers are free to accept, reject or modify these baseline rate guides. As NASSTRAC has acknowledged in the

past, the use of baselines has efficiency benefits and is common in shipper carrier contracts.

It does not follow, however, that if antitrust immunity were terminated, the use of baselines for comparison purposes would end. Instead, shippers would simply identify an existing baseline rate set (e.g., the 2005 Yellow or Roadway tariff or a 2005 edition of CzarLite the shipper had purchased), and call for carriers to provide competitive bids based on that common baseline. This does not need to "heighten transaction costs" at all, and could reduce them, since shippers would be better able to track changes in rates and charges over time.

To be sure, one thing would change. With the passage of time, carrier revenue needs can be expected to rise, due to increased operating costs, insurance premiums, security requirements, compliance programs, efforts to attract and retain drivers, etc. Without antitrust immunity, there would presumably be no rate bureaus and no collectively-set rate increases.

The rate bureaus attack NASSTRAC and NITL on this point, accusing the Shipper Associations of being opposed to any increases in carrier profits. Middlewest Motor Freight Bureau points to the National Transportation Policy's reference to adequate profits for well-managed carriers, and argues that Congress in Section 13703 contemplated profit enhancement through collective ratemaking (Reply Comments at 7), while acknowledging in a footnote that Congress amended 49 U.S.C. § 13703 in 1995 to eliminate "reasonable profit" as an element of the reasonableness of collectively set rates (id.).[1]

[1] In that same footnote, Middlewest cites 49 C.F.R. Part 1139 for the proposition that GRIs should be based on revenue need including reasonable profits, but that regulation has not been amended since 1988, is no longer observed, and could not trump the statute if it were.

SMC goes even farther. Its reply comments include the following statement: "The Shipper Associations' myopic view of motor carrier costing as recovering only costs without any contribution to profit ultimately would lead to the demise of the carriers to the direct detriment of shippers." Reply Statement of Daniel Acker at 4.

In fact, NASSTRAC and NITL understand that carriers sometimes need to raise rates, and that rate increases to preserve or enhance profit margins may be legitimate. The question, however, is how this should be done. The bureau reply comments confuse the recovery of profits, which we do not oppose, with the recovery of profits through collective carrier action immune from antitrust exposure, which we do oppose. Nothing in the National Transportation Policy even mentions collective carrier action, much less establishes a Congressional preference for collective action over competition.

If antitrust immunity were terminated, individual carriers seeking rate increases to cover increased costs, profits or both would need to inform their customers of the proposed increase. The proposed increase could be individually tailored or include many shippers, and could take the form of an increase in the baseline rates or a reduction in the carrier's discount. The shipper would accept the increase, look elsewhere, or negotiate a compromise, as is done throughout the rest of the deregulated economy.

Over time, the combination of collectively-set holdover base rates and negotiated rate increases would change motor carrier ratemaking. The proportion of motor carrier rates set collectively would decrease, and the proportion set through negotiations would increase.

Such an approach is plainly preferable to the status quo. Even if GRIs are voted on with full disclosure of underlying costs, inflation indices (if any) and notice to the uni-

verse of affected shippers (a standard even SMC does not meet), the GRI is voted on only by the bureaus' carrier members. In addition, while GRI decisions may be communicated to shipper members on mailing lists or though websites, there is no legal requirement for carriers to notify shippers when discounted rates increase as the result of GRIs, comparable to the "truth in rates" notice requirement the Board adopted for ranges of discounts.

NASSTRAC and NITL recognize that pervasive discounting may temper the impact of classification changes and GRIs, and that knowledgeable shippers may be able to negotiate complete, if temporary, protection against such increases by providing that their negotiated rates will not change during the term of their contracts. However, termination of NCC and rate bureau antitrust immunity would bring these covert rate increases into the open, allowing competition to set more rates.

Motor carrier ratemaking without carrier antitrust immunity would not require the end of the current system of freight categorized by class rating and discounting off baseline rates. Termination of antitrust immunity would, however, lead to more rates for more shippers based on competitive forces rather than collective carrier action, and to increased openness in motor carrier ratemaking. Because the benefits of such a change would far outweigh its costs, the public interest supports termination of antitrust immunity for NCC and the rate bureaus.

IV. ADDITIONAL CONDITIONS ON NCC AND RATE BUREAU IMMUNITY WOULD BE IN THE PUBLIC INTEREST

NASSTRAC and NITL argued unsuccessfully for an end to immunity in the prior round of NCC and rate bureau reform proceedings, as various carrier-group reply comments are quick to point out. While termination of antitrust immunity is fully justified in this proceeding for reasons set forth above, the Shipper Associations also urge the Board,

in the alternative, to impose further conditions on NCC and the rate bureaus as discussed in our prior comments. The counterarguments of the NCC and rate bureaus are specious.

NCC

The NCC's attitude seems to be that if it can attack every concern expressed in the Shipper Associations' comments, it can ignore recommended improvements in NCC operations. The thrust of NCC's reply comments is that its actions have nothing to do with ratemaking, that the NCC orders classification reductions as often as it orders increases, and that NCC standards do not favor carriers. It is wrong on all counts.

NCC cites a study, based on figures from the 1990s, for the proposition that class rating increases are not more frequent than decreases. Specifically, 784 NCC proposals out of 1,506 involved rating changes (the other proposals are said to have involved clarifications, packaging matters, etc. that are irrelevant here). Of these 784 proposals, 307 involved increases, 252 were mixed (i.e., they involved increases and decreases) and 225 involved reductions. Reply Statement of William Pugh at 1.

Obviously, the wild card here is the "mixed" category. If those docket items were predominantly increases, then 71% of the total number of docket items involved increases in whole or in large part. Clearly, 71% of these changes had some adverse impact on shippers. Conspicuous by its absence is any suggestion by NCC (which presumably has the details) that those mixed items involved predominantly class rating decreases, or increases and decreases in equilibrium (which would mean more increases overall than decreases, since there were more unmixed increases than decreases).

Also conspicuous by its absence is any analysis of dockets since the 1990s, i.e., the last 5 years of NCC's operations. NCC's reliance on such dated and equivocal (at best) analysis is not reassuring.

NCC goes on to point out that shippers as well as carriers may docket items for NCC consideration. Pugh Reply Statement at 4. No information is provided on the success rate of the shippers' proposals, but it bears mentioning that the same 1990s study on which NCC relies to argue that increases are not more common than decreases also analyzed the source of the proposals. NCC's analysis indicated that 62% of the classification proposals came from carriers. It is a safe bet that in few, if any, of those proposals by anonymous carriers, was the carrier asking NCC for a lower commodity class rating.

Notably, NCC does not deny that an "anonymous tip" by a single carrier is all it takes to institute a classification change proceeding. Rather, NCC argues that anonymity is necessary to protect carriers from retaliation. Even if the identity of the carrier seeking the change needs to be protected, it does not follow that the number of carriers supporting a change, or their familiarity with the freight, is irrelevant. NCC also does not deny that a single carrier communication, by a carrier whose experience need not be shown to be representative or accurate, can be enough to initiate a classification change proceeding.

Shipper anonymity is said to be readily available, but this is true only if shippers are content to have their arguments and evidence presented by the NCC Staff, and if it is assumed that the NCC Staff does not disclose information sources within NCC. Few shippers are comfortable with these arrangements, and those that appear at NCC meetings to argue their own cases must do so openly, with significant disclosure of facts about their freight.

NCC goes to great lengths in attempting to rebut the Shipper Associations' concerns about standards that favor carriers, and in particular, NCC's non-linear density guidelines, which raise class ratings more quickly as density falls than they lower class ratings as density rises. See the Pugh Reply Statement at 8-9. (SMC Witness Acker goes out of his way to support the NCC (Reply Statement at 3-4)).

However, neither witness disputes the Shipper Associations' analysis. Rather, both concede that it is correct, but argue that NCC should penalize lighter freight more than it rewards denser freight because this approach is necessary to maintain carrier revenues. NCC Witness Ringer proceeds to point out that freight in general is becoming less dense as commodities become lighter and use lighter packaging. Reply Statement at 22.

The upshot of all this is that shippers should not be surprised that their class ratings and class rates and discount rates are rising. This is the way the system is designed to work.

NCC Witness Ringer ridicules the Shipper Associations discussion of a hypothetical request for a classification proceeding based on a hypothetical carrier's communication regarding whether a shipment of a specific item – Revere 10 inch frying pans – is thought to lack the density necessary to warrant its class ratings. However, his discussion (Reply Statement at 14-15) simply provides more confirmation of the point NASSTRAC and NITL sought to make.

Witness Ringer concedes that, even if the issue presented to the NCC merely involved one transportation characteristic of one specific item, the NCC would seek information as to all transportation characteristics of all commodities covered by the relevant NMFC Item from all manufacturers of those items. This is absurd, and demonstrates the

imbalance in burdens about which the Shipper Associations complained in their opening comments.

The NCC makes much of shippers' ability to resolve disputes as to individual classification determinations through arbitration or protests. These remedies are necessary but not sufficient, since they entail additional burdens and legal fees, and have a narrow rather than structural focus. Shippers want their rates to be set through negotiations in a competitive marketplace, not through proceedings and appeals.

Finally, the NCC argues that shippers' economic self-interest necessarily disqualifies shippers from voting on freight classification issues (Pugh Reply Statement at 10), while vigorously denying that economic self-interest would ever influence carrier or NCC Staff classification actions (id. at 7). The NCC cannot have it both ways.

There is ample evidence in the record of this proceeding that the status quo with respect to NCC freight classification requires change. If NCC antitrust immunity is to be preserved, the Board should establish an advisory group as called for by the Shipper Associations, and it should order corrective action by the NCC.

Rate Bureaus

For their part, the rate bureaus are as ready to make "straw man" arguments as the NCC, and as unreliable in their defense of the status quo. For example, in arguing against the Shipper Associations' suggestion that full undiscounted class rates should be presumed unreasonable, Rocky Mountain Tariff Bureau contends that this "is tantamount to terminating collective ratemaking since carriers would not participate in a system in which any product of their efforts was presumed to be unreasonable." Reply Comments at 4.

For any rate bureau to defend full undiscounted class rates as presumptively reasonable rather than presumptively unreasonable in today's environment is astonishing. According to the rate bureaus' own May 2003 status reports, discounts were as high as 83%.

Nor is Rocky Mountain alone. Witness Acker challenges the basic connection drawn by the Shipper Associations and the STB between the system of high discount rates and the undercharge epidemic, saying that "class rates were never found to be uncompetitive, unreasonable or contrary to the public interest." Reply Statement at 2.

The rate bureaus are incorrect. The leading case here is Georgia-Pacific Corp. – Petition for Declaratory Order, 9 I.C.C. 2d 103 (1992), aff'd. sub nom Oneida Motor Freight, Inc. v. ICC, 45 F.3d 503 (D.C. Cir. 1995). The Commission there explained:

> In due course, various "corrected" freight bills were delivered to Georgia-Pacific, and payment for alleged undercharges in ever increasing amounts were demanded. Most of the corrections were based on either Middle Atlantic Conference class rates or, in a few instances, New England Motor Freight Bureau class rates.

9 I.C.C. 2d at 109, footnote omitted. Of course, the Commission went on to find those bureau class rates uncompetitive, unreasonable and contrary to the public interest.

Rocky Mountain cites this very decision for the proposition that rates cannot be found unreasonable unless they exceed market cluster of rates used for comparison. However, the rate bureaus have already claimed that their members no longer charge full undiscounted class rates to any shipper. And, of course, as the Board pointed out early in the last rate bureau reform proceeding:

> Thus, the most effective shipper protection that we can afford, short of abolishing collective ratemaking entirely, is to ensure that, if a carrier wants to charge a rate above a

> competitive level, it will not be able to justify its charges by reference to an unrealistically high list price set through a governmentally-sanctioned collective ratemaking process.

EC-MAC, supra, decision served December 18, 1998 at 7.

The rate bureaus also resist the Shipper Associations' call for true automatic minimum discounts, even though they cannot deny that their voluntary minimum discount programs have not worked. The defense offered by Middlewest's CEO, Jeffrey Michalson, would permit any bureau carrier to offer a 5% discount off full bureau class rates, or even 0% discount rates. The latter example would bring us full circle: actual rates would be precisely the rates set collectively by a rate bureau, with individual carrier action absent.

The goal of the Shipper Associations' prior recommendation was not to force reductions in undiscounted bureau class rates (that option having been rejected by the Board) but to make sure that such rates serve only as baseline rates, and are never actually collected. The rate bureaus' comments in this proceeding show why this goal is now more pressing than ever.

In addition, if minimum discounts are to become more rare, it is all the more important for the rate bureaus to explain the basis for their GRIs. To what extent are they designed to cover cost increases, and what cost calculations underlie the proposed rate increase? Are fuel cost increases being recovered?

Only SMC offers details, and it has not been forthcoming on the matter of index adjustments, if any. EC-MAC's skeletal comments ignore this and other issues. The Rocky Mountain, Middlewest and PITB replies are silent.

The Shipper Associations have already addressed the deficiencies in the rate bureaus' defense of collective ratemaking for profit enhancement. Essentially, the rate bureaus' defense is that they have always used collective ratemaking for that purpose, and that if laws supporting that approach are now gone, at least no laws prohibit collective profit enhancement with antitrust immunity.

To reiterate, the Shipper Associations do not oppose carrier profit enhancement. The trade press indicates that the trucking industry is enjoying healthy returns as a result of reduced capacity. However, collective ratemaking should, at most, be used only for cost recovery, and today's rising freight rates demonstrate that there is no need for profit enhancement through collective rate increases.

Finally, as noted in the Shipper Associations' reply comments, the Board and the public would benefit from knowing more about the membership, staffing, operations and finances of the rate bureaus, if their antitrust immunity is to be maintained. Some have informative websites, like SMC's, but even SMC resists disclosure about its financial health. At the other extreme, EC-MAC and some other rate bureaus do not maintain websites, and provide little or no public information. This should change.

V. CONCLUSION

For the reasons set forth above and in their prior comments, the Shipper Associations urge the Board to terminate the antitrust immunity of NCC and the rate bureaus. The result would benefit the public interest in a competitive but still orderly trucking marketplace. If the Board elects not to do so, it should, at a minimum, further condition the immunity of NCC and the rate bureaus to reduce their incentives and opportunities for anticompetitive conduct.

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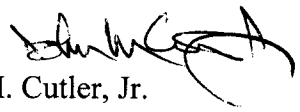
Respectfully submitted,



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